

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E607698

JAMES M. CROWDER, EMPLOYEE

CLAIMANT

ARKANSAS POWER & LIGHT COMPANY,
SELF-INSURED EMPLOYER

RESPONDENT NO. 1

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

OPINION FILED NOVEMBER 22, 2004

Submitted on the record and briefs in lieu of a full hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE JIM L. JULIAN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

ISSUES

This claim was submitted on the record and briefs to determine the claimant's entitlement to payment of additional benefits and attorney's fees.

At issue is the constitutionality of Act 11698 of 1999 and its application to pre-1999 injuries; and the respective liability of the employer and the Fund.

After reviewing the arguments, I find the claimant is entitled to additional benefits.

STATEMENT OF THE CASE

The parties stipulated to a self-insured employer-employee relationship on May 29, 1996, at which time the claimant sustained multiple compensable injuries as a result of electrical burns at a compensation rate of \$337.00/\$253.00. Medical expenses, temporary total disability benefits (until September 9, 1997) and 260 weeks of permanent partial disability benefits have been accepted.

The parties further stipulate that the claimant's healing period ended September 9, 1997 and he was assessed an impairment rating of 46% to the body as a whole. The parties also stipulate that the claimant is permanently and totally disabled. At the time of the compensable injury, the claimant

was 62 years old, and his date of birth is December 16, 1933.

The claimant contends Act 11698 of 1999 is a substantive change in the law and cannot be retroactively applied to the claimant's injury. Additionally, the Act is unconstitutional and violates the claimant's civil rights.

Respondent No. 1 contends the statute is constitutional and their liability for permanent partial disability benefits is limited to 260 weeks.

Respondent No. 2, the Fund, contends the statute is constitutional and the claimant is limited to 260 weeks of permanent total disability benefits. Respondent No. 2 also contends that the carrier is responsible for paying the anatomical rating (permanent partial) before payment of wage loss disability (permanent total) benefits begins pursuant to Ark. Code Ann. §11-9-522. Additionally, Respondent No. 1 is not entitled to a credit against its \$75,000.00 maximum for payment of the rating. The Fund also contends they are not responsible for payment of benefits before August 17, 2004 (ninety days after receipt of notice on May 20, 2004) pursuant to Rule 28.

The following were submitted without objection and comprise the evidence of record: the prehearing questionnaires of the parties along with their exhibits and briefs, incorporated by reference.

FINDINGS AND CONCLUSIONS

Act 11698 of 1999 (Ark. Code Ann. § 11-9-522(f)), limits permanent total disability benefits to 260 weeks for disability resulting from injuries sustained after the age of sixty. Prior to this time, the claimant was entitled to benefits for the remainder of his lifetime.

There is a presumption that statutes are constitutional and must be applied prospectively. Abrego v. United Peoples Federal Savings and Loan Assn., 281 Ark. 308, 664 S.W.2d 858 (1984), Ester v. National Home Centers, Inc., 335 Ark. 356, 981 S.W.2d 91 (1998) and Dooley v. Automated Conveyor Systems, ___ Ark. App. ___, ___ S.W.3d ___ (2004):

As a general principle regulations and statutes operate prospectively only. The United States Supreme Court recently opined:

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. (internal citations omitted). This Court has often pointed out that

the first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be “the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.” Abrego, supra.

All statutes are presumed constitutional and we resolve all doubts in favor of constitutionality... The party challenging a statute’s constitutionality has the burden of proving that the Act lacks a rational relationship to a legitimate objective of the legislature under any reasonably conceived set of facts... It is not our role to discover the actual basis for the legislation... We merely consider whether there is any rational basis which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of arbitrary and capricious government purposes. If we determine that any rational basis exists, the statute will withstand constitutional challenge, (internal citations omitted), Ester, supra.

Only procedural changes may be retroactively applied. Changing a vested right is regarded as substantive and must be applied prospectively. Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987), and Popeye's Famous Fried Chicken v. Willis, 7 Ark. App. 167, 646 S.W.2d 17 (1983).

The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should . . . be given a retrospective effect whenever such seems to have been the intention of the Legislature. Popeye's Famous Fried Chicken v. Willis, *supra*.

Accordingly, I find Act 11698 of 1999 is constitutional but makes a substantive change in benefits to an injured worker and cannot be retroactively applied to a pre-1999 injury case.

Therefore Respondent No. 1 is liable for payment of benefits (subject to their \$75,000.00 cap) before the Fund assumes liability after proper notice as provided in Rule 28B, (revised January 1, 2004). The employer did not advance an argument regarding notice to the Fund, and I assume they have no objection on this issue.

With regard to the respective liability of the employer and the Fund, this case is governed by Death and Permanent Total Disability Trust Fund v. Whirlpool, 39 Ark. App. 62, 837 S.W.2d 293 (1992) in which the Supreme Court held that employers could credit payments of permanent partial disability benefits against the \$75,000.00 maximum cap provided by Ark. Code Ann. §11-9-502. To the best of my knowledge, this case has not been overturned and as an Administrative Law Judge, I am bound by this precedent.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employee-employer-carrier existed among the parties on May 29, 1996 at which time the claimant sustained compensable injuries at a compensation rate of \$337.00/\$253.00. Medical expenses, temporary total disability benefits and 260 weeks of permanent partial disability benefits have been paid.
2. Respondent No. 1 is allowed a credit for payment of permanent partial disability benefits (anatomical impairment) against the \$75,000.00 statutory maximum of permanent total disability benefits.

3. Respondent No. 1 must pay benefits for 90 days after notice to the Fund.
4. Act 11698 of 1999 is constitutional.
5. Act 11698 of 1999 is a substantive change in the law which cannot be retroactively applied to this case.
6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge